

UNITED STATES SUPREME COURT

No. 08-11144

BURHAN UDDIN AMHED,

Petitioner

v.

UNITED STATES,

Respondent

On Writ of Certiorari from the United States Supreme Court

BRIEF FOR THE PETITIONER

5874

QUESTIONS PRESENTED

- I. WHETHER THE PRESIDENT HAS THE AUTHORITY TO INDEFINITELY DETAIN A RESIDENT ALIEN FOR SUSPECTED AFFILIATION WITH AL QAEDA WHO WAS ARRESTED IN THE UNITED STATES AND NEVER TOOK UP ARMS AGAINST THIS COUNTRY AS AN ENEMY COMBATANT?

- II. WHETHER THE FAILURE BY THE DISTRICT COURT TO PERFORM A MATHEWS BALANCING TO DETERMINE IF THE GOVERNMENT'S FACES AN ADDITIONAL BURDEN REQUIRING A LOWERING OF DUE PROCESS OWED AHMED, IN CONJUNCTION WITH THE USE OF HEARSAY AS THE SOLE EVIDENCE OF GUILT, VIOLATED AHMED'S CONSTITUTIONAL RIGHTS?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution, Amendment V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution, Amendment XIV § 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF)

STATEMENT OF FACTS

On September 8, 2001, petitioner, Burhan Uddin Ahmed ("Ahmed") legally entered the United States from his native Pakistan to pursue a degree in veterinary medicine.

On September 11, 2001, al Qaeda highjacked two commercial airplanes and crashed them into targets in New York and Washington D.C. Congress reacted by authorizing the president to use military force against the nations and individuals responsible for the attacks.

On January 3, 2002, federal agents arrested Ahmed as a material witness in the attacks. In November, Ahmed was charged with possession of counterfeit Social Security cards and making false statements to law enforcement. Ahmed pled not guilty. On June 9, 2003 the court scheduled a hearing on a motion to suppress evidence that Ahmed claimed was obtained with torture. On June 13, the government filed a motion to dismiss based on an executive order issued that morning.

The President's executive order "determined" that Ahmed is an enemy combatant who is closely associated with al Qaeda, prepared for acts of international terrorism, possesses valuable intelligence, and is a danger to the country. The President claimed military detention was necessary to prevent Ahmed from aiding al Qaeda, and Ahmed was summarily detained indefinitely as an enemy combatant.

PROCEEDINGS BELOW

Ahmed was transferred to the Army Regional Consolidated Detention Facility. Ahmed then filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 to secure his release. Ahmed asserted that his detention as was unlawful and that if the government refused to file charges against him then the constitution demanded his release. Alternatively, Ahmed argued that he must be afforded a hearing to challenge the factual basis for his designation. The government opposed his release. Asserting that the President has the Authority to hold Ahmed and that Ahmed already received the necessary process to challenge his detention. The government provided a hearsay document, the Declaration of John R. Murphy (Murphy Declaration). This hearsay statement, included information that the government claims sufficiently demonstrates Ahmed's involvement with al Qaeda through membership, communication, and conspiracy to commit sabotage. The district court found that Ahmed could be detained, but found that Ahmed was entitled to challenge the factual basis of his detention consistent with procedural due process.

The district court sent the case to a magistrate judge to determine the process owed to Ahmed. The Judge only considered the Murphy Declaration, concluding that it provided Ahmed with adequate notice of the factual basis for his detention and

offering sufficient evidence to indicate that Ahmed was an enemy combatant, and placed the burden on Ahmed to produce more persuasive evidence refuting this determination. The magistrate judge allowed Ahmed 60 days to present rebuttal evidence. Ahmed responded with a general denial. He asserted that he was not an enemy combatant, but refused to offer any evidence to rebut the Murphy Declaration, insisting that the procedures adopted by the magistrate judge were unconstitutional. Subsequently, the magistrate judge then recommended that Ahmed's petition for a writ of habeas corpus be dismissed. The district court agreed, and Ahmed's petition was dismissed.

Ahmed appealed and a panel of appellate court affirmed the district court's dismissal. Upon Ahmed's motion for rehearing, the court voted to vacate the panel opinion and hear the case en banc. The court found that Ahmed's designation was appropriate but the due process afforded Ahmed was not sufficient and remanded the case back to the district court in order to provide Ahmed with the additional process that was required.

SUMMARY OF ARGUMENT

This Court should overturn the Twelfth Circuit's judgment and grant Petitioners petition for a writ of habeas corpus. The issues before the Court are whether the President has the authority to detain as an enemy combatant a resident alien who was arrested in the United States and never took up arms against

this country for suspected affiliation with Al Qaeda, and whether the failure by the district court to perform a Mathews balancing to determine if the government faces an additional burden requiring a lowering of due process owed Ahmed, in conjunction with the use of hearsay as the sole evidence of guilt, violated Ahmed's constitutional rights.

The President lacks the does not have the authority to unilaterally designate Ahmed as an enemy combatant and subject him to indefinite detention. First, Congress has not authorized detention of legal residents apprehended in the United States as enemy combatants with the Authorization for Use of Military Force ("AUMF"). Ahmed is not an enemy combatant under the AUMF because he has not taken up arms against the United States as a member of enemy military forces. The recent precedent defines enemy combatants in terms of taking up arms with the formal military forces of an enemy government. Furthermore, international law requires definition of an enemy combatant as a member of the formal military forces of an enemy government. As a policy matter, enemy combatants should be defined as individuals taking up arms with formal military forces because the definition provides a bright-line evidentiary rule that prevents unmerited denial of Constitutional rights.

Second, the Constitution does not grant the power to indefinitely detain non-combatants residing in the United States

because the President is not acting with the authorization of Congress and such detentions are unconstitutional.

In the alternative, Ahmed's challenge of the factual basis of his enemy combatant designation did not afford him sufficient due process as required under the Fifth and Fourteenth Amendments. The government relied solely on hearsay evidence without demonstrating that producing more reliable evidence created a significant burden on the government, as required by *Hamdi*. The district court failed to conduct a *Mathews* balancing of the circumstances surround the detention or the burdens faced by the government. Yet the court implicitly concluded a weakening of the due process owed Ahmed and that the use of hearsay evidence was sufficient. Given the decision in *Hamdi* and the ability of the district court to effectively make such a determination, the failure to conduct a *Mathews* balancing or provide sufficient due process to Ahmed clearly violated his rights.

ARGUMENT

I. THE PRESIDENT LACKS THE AUTHORITY TO DESIGNATE AHMED AS AN ENEMY COMBATANT BECAUSE AHMED DOES NOT QUALIFY AS A HOSTILE FORCE UNDER THE AUMF AND THE CONSTITUTION DOES NOT GRANT THE POWER TO SUSPEND CRIMINAL PROCEDURES FOR NON-COMBATANTS.

The Fourteenth and Fifth Amendments afford all persons, regardless of their citizenship, equal protection under the laws by the federal government. See, *Yick Wo v. Hopkins*, 118 U.S. 356,

374 (1886); Boiling v. Sharpe, 347 U.S. 497 (1954). Under this principle, all persons have the Constitutional right to be charged and tried in a criminal proceeding for accusations of illegal conduct before detention. [R. 10]; See, United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"). However, a narrow exception to this right exists for those properly designated as an enemy combatant under the President's legal authority, and such persons may be detained indefinitely outside the Constitutional protections of criminal procedure. [R. 10]; Hamdi v. Rumsfeld, 542 U.S. 507, 519-21 (2004).

Given that designation as an enemy combatant can lead to indefinite detention and suspension of constitutional rights, defining the scope of the President's authority to unilaterally designate persons as enemy combatants and detain them is of the utmost importance. The question here is whether the President has the power detain a United States resident, apprehended domestically, as an enemy combatant solely for suspected affiliation with Al Qaeda. The standard of review for this question of law is de novo. Wright v. West, 505 U.S. 277, 306 (1992). Ahmed does not qualify as an enemy combatant within the President's authority to detain. Therefore, the Court should grant Ahmed's petition for a writ of habeas corpus and grant

relief in the form or release from military custody, or in the alternative, criminal proceedings in a civil court.

A. Ahmed is not an enemy combatant under AUMF authorization because he has not taken up arms against the United States as a member of enemy military forces.

The AUMF does not authorize the President to detain Ahmed as an enemy combatant. The Court has held that the AUMF authorizes the President to detain enemy combatants "who have taken up arms against the United States in support of a country or government that is our enemy". Hamdi, 542 U.S. at 519-21; Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). Enemy combatant is defined as "affiliation during wartime with military arm of enemy government". al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

These definitions illustrate that the essential characteristic in allowing detention as an enemy combatant, taking up arms in the formal military forces of an enemy nation. Ahmed does not satisfy this criteria, and therefore, the President lacks the authority to properly designate him as an enemy combatant and detain him.

1. Recent precedent defines enemy combatant in terms of taking up arms with the formal military forces of an enemy government.

Ahmed, as a legal alien who was arrested in the United States and has never taken up arms against the country, does not conform to the universal characteristics of enemy combatants in

recent case law. In Hamdi and Padilla, both detainees had taken up arms against the United States in a foreign combat zone. Hamdi v. Rumsfeld, 542 U.S. 507, 519-21 (2004); Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005). This characteristic is determinative because citizens who associate with the military of an enemy become enemy combatant. Hamdi, at 519. By associating with the enemy military and taking up arms against the United States, the protections of the Constitution are suspended because that individual has acted in open hostility which suspends presumption of innocence and the deferential standard given to defendants.

However, Quirin is inapposite to whether the president has the authority detain a citizen or legal resident for alleged affiliation with the enemy as an enemy combatant. Haupt's status as an enemy combatant was not at issue. It was stipulated that Haupt was a soldier in the German army, received sabotage training, entered the country on a military vessel, carried explosives, wore an uniform as he entered the country, and removed the uniform in violation of the law of war. Ex parte Quirin, 317 U.S. 1, 21 (1942). The necessary characteristics for designation as an enemy combatant were already established, so Haupt's content was that the President lack the authority to try him in a military tribunal. Id. at 24.

Contrary to interpretation of the lower court, Quirin supports the proposition that those detained as enemy combatants have taken up arms against the United States as part of formal military forces.

Conversely, those who have not taken up arms against the United States as part of an enemy military force must be tried in civilian courts. *Ex Parte Milligan* held that a "citizen not connected with the military service and resident in a State where the courts are open" is entitled to all criminal proceeding in a civil court. Ex parte Milligan, 71 U.S. 2, 3 (1866). In that case, Milligan faced accusations of being a member of an organization that supported the Confederacy during Civil War, communicating with the Confederacy, and conspiring to steal weapons and liberating prisoners of war. Id. at 6-7. The court held that as a citizen residing in the United States and arrested therein, Milligan could not be tried as an enemy combatant and must be given a civil trial. Id. at 75-77.

Ahmed is not an enemy combatant subject to indefinite detention because unlike the cases of Hamdi, Padilla, and Quirin, he did not take up arms with an enemy force. On the contrary, he is a legal resident and was arrested in the United States, as was the case in Milligan. Also like Milligan, Ahmed is accused of membership in an enemy organization, communicating with the enemy organization, and conspiring to commit sabotage.

Therefore, the government's assertions are insufficient to detain and try Ahmed as an enemy combatant.

Attempts to distinguish this case from Milligan on the basis of Ahmed's lack of citizenship or the difference between al Qaeda and Milligan's organization are unsatisfactory. Resident aliens are afforded substantially the same due process protection as persons under the Fourteenth Amendment as citizens under the Fifth Amendment. See, Hurtado v. California, 110 U.S. 516 (1884). The lower court's attempt to distinguish Milligan on the basis that Congress had not declared war on the organization at issue is strained. Milligan was accused of attempting to aid the Confederacy, the entity with which the United States was at war. Milligan at 6. The differences between the allegations in the two cases are insignificant. Consequently, Ahmed does not qualify as enemy combatant under the Court's precedent.

2. International law requires definition of an enemy combatant as a member of the formal military forces of an enemy government.

Detainees in the conflict with al Qaeda are afforded the protections of the Geneva Convention. See, Hamdan v. Rumsfeld, 548 U.S. 557, 628 (2006). The Geneva Convention defines prisoners of war, captured enemy combatants, as members of a militia who are commanded by a responsible person, have a sign recognizable at a distance, openly carry arms, and follow the

laws of war. 75 U.N.T.S. 135. These are the exclusive characterizations of enemy combatants, and the only other relevant classification for individuals during war is that of civilian. This dichotomy is consistent with the Court's reasoning in Milligan. Milligan, 71 U.S. at 83 (noting that a detainee is either given the benefits and penalties of either a prisoner of war or civilian, and prisoner of war status is determined by whether the detainee engaged legal acts of hostility against the government).

Additionally, this international law is incorporated in United States domestic law. Paquete Habana, 175 U.S. 677, 700 (1900). The Charming Betsy Canon of interpretation states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". See, Murray v. Charming Betsy, 6 U.S. 64, 118 (1804). Statute only supersedes treaty obligations when Congress has "clearly evinced an intent" to do so. U.S. v. Palestine Liberation Organization, 695 F.Supp. 1456, 1464 (S.D.N.Y. 1988).

Congress' authorization to detain enemy combatants under the AUMF does not clearly evince intent to supersede the Geneva Conventions definition enemy combatants. On the contrary, the AUMF only authorizes for "all necessary and appropriate force against" the nations and organizations that "planned, authorized, committed, or aided" in the 9/11 attacks. AUMF, 115 Stat. 224.

The authority to detain enemy combatants is incidental to the use of force; however, the AUMF does not show any intent to redefine the characteristics of who may be detained as an enemy combatant. See, Hamdi, 542 U.S. at 518. Therefore, the definition of an enemy combatant remains that of the Geneva Conventions.

Given that Ahmed did not exhibit any of the characteristics presented in Article 4 of the Geneva Conventions, the President exceeded his authority in detaining Ahmed as an enemy combatant.

3. Enemy combatants should be defined as individuals taking up arms with formal military forces because the definition provides a bright-line evidentiary rule that prevents unmerited denial of Constitutional rights.

The Court should demand that taking up arms with the formal armed forces of an enemy as the sole basis for detention as an enemy combatant. The Geneva Convention defines combatants based on appearance and conduct in hostile activities. See, 75 U.N.T.S. 135. This criteria in presentation provides conclusive evidence for the presumption that an individual is an enemy combatants and thus merits detention until the end of hostilities. Without the outward characteristics of an enemy combatant, the presumption that an accused resident or citizen merits detention without criminal proceedings is unwarranted. Therefore, the Court should apply Constitutional protections of criminal procedure to an alleged enemy combatant apprehended in

the United States and legally residing therein unless they have taken up arms as part of a formal enemy force.

In addition, finding authority to detain suspects apprehended on American soil as enemy combatants creates the potential for abuse by the President. First, such threatens to undermine constitutional protections for all American citizens. American Bar Association, Task Force on Treatment of Enemy Combatants Criminal Justice Section, Section of Individual Rights and Responsibilities, Report the House of Delegates 3 (2003). Any American citizen or resident could be detained indefinitely outside the Constitution's protections for merely being accused by the government of affiliation with terrorist organization. See, Id. at 2; Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002) (noting the danger that "any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so"). Second, potential designation as an enemy combatant can be used as a coercive device against residents suspected of being a terrorist induce guilty pleas in civil courts. One scholar has contended that several of such incidents have already taken place. Carl Takei, Note, Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of "Enemy Combatant" Detention Violate the Right to Due Process, 47 BCLR 581, 586 (2006). By defining enemy combatants based on undisputed status as belligerents

against the nation, potential for such abuses in the United States would not exist.

Moreover, expansion of the authority of the President to detain suspects on United States soil as enemy combatants is unnecessary in the War on Terror. The Fourth Circuit argued in Padilla that the President would not be able to protect the nation from further terrorist attacks without the ability to detain those like Padilla. Padilla, 423 F.3d at 397. However, that argument is questionable in cases like the one at hand because domestic law enforcement was able to arrest Ahmed, gather evidence against him, and bring him to trial. If the government could establish its accusations beyond a reasonable doubt, both in cases like Padilla and Ahmed, then the purpose of preventing combatants from returning to the battlefield would be served without having to use military tribunals. See, Hamdi, 542 U.S. at 519 (noting that the purpose of detention of combatants to prevent a return to battle); Milligan, 71 U.S. at 77 (noting that if a citizen is an accused saboteur, then the Constitution demands presentation of evidence at grand jury indictment then civil trial.).

Because the same outcome can be achieved through either military or civil courts, the question becomes whether the circumstances necessitate the suspension of the right to civil trials under the Fifth Amendment. The Court in Milligan

rejected arguments for suspending access to civil courts based on necessity. “[T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.” Milligan, 71 U.S. at 76. This position may be dismissed in light of the unprecedented threat posed by terrorism, but Milligan propounded these principles immediately after the Civil War, the conflict that killed the greatest number of Americans and was arguably the greatest threat to existence of the nation. It follows that the terrorist threat facing our country does not necessitate use of military trials for residents accused of war crimes. Defining enemy combatants in terms of bearing arms with enemy forces will assure that American residents are not subject to unconstitutional detention and military adjudication.

B. The Constitution does not grant the power to indefinitely detain non-combatants residing in the United States because the President is not acting with the authorization of Congress and such detentions are unconstitutional.

Given that the AUMF does not authorize the President to unilaterally detain United States residents on suspicion of al Qaeda membership, the President is not acting within his maximum foreign affairs power under Justice Jackson’s Youngstown Steel framework. On the contrary, he is operating in an undefined “twilight” of his powers. See, Youngstown Sheet & Tube Co. v.

Sawyer, 343 U.S. 579, 636 (1952) (Jackson J., concurring).

Because such detentions would conflict with international law without additional authority from Congress, the Court should not uphold this power. Furthermore, only Justice Thomas based his decision in Hamdi solely on the President's Article II authority as commander-in-chief, so there is no basis in precedent for affirming the President's constitutional power to detain as enemy combatants residents similarly situated to Ahmed without the support of Congress. Therefore, the President lacks the inherent Constitutional authority to detain United States residents as enemy combatants.

II. AHMED WAS NOT AFFORDED SUFFICIENT DUE PROCESS TO CHALLENGE THE FACTUAL BASIS OF HIS DESIGNATION AS AN ENEMY COMBATANT.

Ahmed's district court challenge of his enemy combatant designation did not afford him sufficient due process as required under the Fifth and Fourteenth Amendments. The government relied solely on hearsay evidence without demonstrating that producing more reliable evidence created a significant burden on the government, as required by Hamdi. Effectively prohibiting Ahmed from confronting the witnesses against him and depriving him of his right to due process. By relying solely on this hearsay evidence and forcing Ahmed to produce evidence to prove his own innocence, the district court failed to provide him with a fair opportunity to rebut the

charges against him.

A. The constitutional protections apply to Aliens who legally entered the United States.

The Constitution and laws of the United States guarantee Ahmed certain protections, despite his status as an Alien. The Constitution guarantees that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V; See also, Id. amend. XIV, § 1. The amendment specifies that no "person" shall be deprived of these rights and that its protections are not limited to US citizens. Id. As such the Fifth Amendment extends to all lawfully admitted aliens living within the United States. See, Wong Wing v. United States, 163 U.S. 228, 238 (1896). The Supreme Court has repeatedly held that foreign nationals receive those right guaranteed by the due process clause. Boumediene v. Bush, 128 S.Ct. 2229, 2246 (2008). "[O]nce an alien lawfully enters and resides in this country he becomes invested with ... rights ... protected by ... the Fifth Amendment[] and by the due process clause of the Fourteenth Amendment." Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n. 5 (1953) (internal quotation marks omitted). Ahmed is a citizen of Pakistan, he and his family lawfully entered the United States on September 8, 2001. Ahmed came to the United States in order to pursue a doctor of veterinary medicine degree. Ahmed attended Wilson University in Wilson, East Dakota for the four months he

resided in this country before his arrest. Therefore, Ahmed deserves the full protection of the Fifth and Fourteenth Amendments. The district courts failure to provide Ahmed with sufficient due process was in violation of Ahmed's rights.

B. Hamdi provided the framework to ensure that persons detained under the AUMF have their due process rights protected.

The framework presented in Hamdi provide for a balancing of the due process rights of the person charged and the national security needs of the government. Hamdi held "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker." Hamdi, 542 U.S. at 533. Recognizing the tension between the rights of the individual and the needs of the government, Hamdi further held that "the *exigencies of the circumstances may demand* that... enemy-combatant proceedings *may* be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." Id. (emphasis added). Given this tension and additional burden on the Executive this court created a rebuttable presumption in favor of the government, and allowed for the use of hearsay evidence when the circumstances demanded its acceptance "as the most reliable available evidence from the Government in such a proceeding." Id. at 534. Hamdi ensured that

a person detained under the AUMF receives due process to challenge their designation as an enemy combatant, to the fullest extent possible given the burdens on the government to produce evidence of the detainee's guilt. The use of the terms "may", "might", given the exigencies of the circumstances" demonstrate the courts unwillingness to establish a minimum protection of a detainees due process rights. Rather this language indicates that there ought to be the fullest protection possible given the circumstances surrounding the case.

1. Hamdi requires a Mathews balancing in order to determine the process due to Ahmed.

In Hamdi the sole evidence presented by the government was hearsay evidence, however the Supreme Court never stated that the sole use of hearsay evidence was necessarily sufficient to satisfy the Government's burden in habeas corpus proceedings. Instead the court called for a district court to conduct a Mathews balancing. Such a balancing will address the "risk of an erroneous deprivation" of a detainee's interest, while eliminating those procedures that have questionable additional value given the additional burden on the government in such cases. Id. at 534 (Citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). Hamdi specifically stated that the "district court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process

that is both prudent and incremental.” Id. at 538. “We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.” Id. at 538-539. This balancing requirement demonstrates that district courts should not accept hearsay evidence outright. Instead district courts should carefully balance the needs of the government with the rights of the individual. The magistrate judge in Ahmed’s case considered the Murphy Declaration, concluding that it provided Ahmed with adequate notice of the factual basis for his detention and offered sufficient evidence. However, the Judge did not conduct a Mathews balancing, and never considered whether the limitation of Ahmed’s due process rights were necessary in order to alleviate a significant burden on the government.

2. The district Court failed to perform a Mathews balancing in order to determine the appropriate due process owed to Ahmed.

The Magistrate Judge failed to conduct a Mathews balancing to determine that the due process rights ought to be relaxed due to additional burden on the government. Mathews dictates that in any instance the process due is determined by weighing the detainee’s liberty interest against the government asserted

interest and the burdens the government would face in providing greater process. Hamdi, 543 U.S. at 529 (Citing Mathews, 424 U.S. at 335). "The Mathews calculus [] contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute procedural safeguards.'" Id. At no point throughout this process has any the government been required to demonstrate the burden it would face by requiring the presentation of more reliable evidence of Ahmed's guilt. Without such information it is impossible to determine whether this burden outweighs the risk of erroneous deprivation of rights.

3. The use of hearsay evidence in Hamdi does not indicate that such evidence sufficient for every detainee being held under AUMF.

Due Process is not a formalistic fixed concept, rather due process adapts to the circumstances of each individual case, therefore the use of hearsay evidence in Hamdi does not necessarily allow for such evidence in all case. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." Hamdi, 543 U.S. at 526 (internal quotation marks and alteration omitted.) Courts in habeas corpus cases "retain some ability to vary the ways in

which" enemy combatants may present and rebut facts "as mandated by due process." *Id.* In Hamdi the plurality considered whether "in light of separation-of-powers concerns, § 2241 should be construed to forbid the District Court from inquiring beyond the affidavit Hamdi's custodian provided in answer to the detainee's habeas petition. The plurality answered this question with an emphatic 'no.'" Boumediene, 128 S.Ct. 2229 at 2269 - 2270 (Citing Hamdi, 542 U.S. at 527.) As demonstrated by Hamdi the additional burden placed on the government by requiring additional evidence may outweigh the rights of the detainee. Allowing for the use of hearsay evidence as the sole evidence of guilt. However, by requiring a *Mathews* balancing to determine if the government's burden outweighs the individual's liberty interest, it follows that given a different set of circumstances such evidence may not be sufficient.

4. The due process owed to an individual ought to be circumstance dependent.

Boumediene specifically supports the requirement of a fact specific inquiry in order to determine the due process owed to Ahmed. Recognizing that depending on the circumstances of the case a limited proceeding may be constitutionally sufficient. Boumediene, 128 S.Ct. at 2266. As noted by the Court, "common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed *depending upon the*

circumstances." Id. (emphasis added.) "Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires... [that] the process a given prisoner is entitled to receive *depends on the circumstances* and the rights of the prisoner." Id. at 2283. (Robert's dissent) (citation omitted) (emphasis added). Had the Magistrate Judge conducted the necessary inquiry the vast differences between Ahmeds and Hamdi's case would have demonstrated that the burden on the government was significantly less in Ahmed's case. Hamdi was a foreign national captured on foreign soil during the course of an armed conflict. These circumstances easily demonstrate that the government would face a significant burden if the presentation of witness or more reliable evidence was required. Ahmed, however, was living in the United States at the time of his arrest. He was attending veterinary school, and it was only after his arrest for a domestic criminal manner that the government determined Ahmed to be an enemy combatant. These circumstances do not unequivocally demonstrate the burden placed on the government by requiring more reliable evidence. Thus, additional process ought to be required in order to ensure that the enemy combatant determination wasn't in error.

C. Additional Process is required to ensure that the designation of an individual as an enemy combatant isn't in error.

1. The Court should afford process that resembles common law

due process as closely as possible considering the additional burden the government faces.

Though weakening the due process protection may be required given the additional burden faced by the government, the court should afford the detainee the most protection possible given the circumstances. Justice Scalia in his dissenting opinion argued that absent a suspension of Habeas Corpus the Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." Hamdi, 542 U.S. at 556. Justice Scalia went on to argue that the "...criminal process was viewed as the primary means - and the only means absent congressional action suspending the writ - not only to punish traitors, but to incapacitate them." Id. at 568. The plurality did not agree, finding that due to the increased burden faced by the government a less formal process was constitutionally appropriate. See Generally, Hamdi, 542 U.S. at 507. It follows that this additional burden is necessary to justify the removal of the protections provided by due process. Therefore if the government is unable or unwilling to demonstrate that the circumstances demand that the proceedings be "tailored to alleviate their uncommon potential to burden the Executive" or that the hearsay affidavit was "the most reliable available evidence from the [g]overnment" than the removal of the common law due process protections are unjustified. Hamdi, 542 U.S. at

534. The government ended the domestic criminal trial against Ahmed in order to detain him indefinitely as an enemy combatant. Requiring the government to prove its additional burden is the only way to follow the Hamdi precedent, while ensuring that the government does not receive unprecedented latitude to seize any person legally residing in this country without due process. Absent this demonstration by the government, common law due process is owed to any individual detained by the government.

2. Additional process could be provided with minimal interference with the Government's national security interest.

The District Court is qualified to make these determinations while continuing to protect the Government's interests. "Our judicial system is well-equipped to handle classified material efficiently and to balance an accused's right to review evidence against national security interests." Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 5 (2008). The Supreme Court "dictate[ed] that the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." Hamdi, 543 U.S. at 529 (internal quotation marks and citation omitted). Nothing in the record refutes Ahmed's argument that

the government could obtain and produce workable evidence of Ahmed's guilt. If the government wishes to counter this argument the district court could easily conduct an in-camera, ex-parte proceeding where the government could present evidence supporting their allegations against Ahmed. Allowing the government to make its case for keeping such evidence from public inspection while demonstrating that the lessened process is necessary. The district court would have the authority to determine which evidence is appropriate for presentation in the Habeas proceeding. While ensuring that any evidence indicative of the detainees' guilt that is inappropriate for presentation to the public is considered when determining what process is afforded. As demonstrated in Moussaoui, the district court has the ability to craft remedies that satisfy an enemy combatant's unique evidentiary requests without unduly burdening the Government or compromising national security. See, U.S. v. Moussaoui, 382 F.3d 453 C.A.4 (Va. 2004). The ability of the District court to effectively and efficiently make such a determination only further supports the contention that the Courts failure to do so violated Ahmed's rights.

CONCLUSION

For the aforementioned reasons, respondent respectfully requests this Court REVERSE the judgment of the Twelfth Circuit

and grant Ahmed's petition for a writ of habeas corpus and release Ahmed from military custody, or in the alternative, criminal proceedings in a civil court. Or remand the case to the district court requiring the court to perform a Mathews balancing to determine the appropriate process due to Ahmed.

Respectfully submitted,

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By his attorneys,

Attorney

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